

Law and Business Review of the Americas

Volume 13 | Number 2

Article 3

2007

Environmental Fees and Compensatory Tax in Brazil

Jose Marcos Domingues

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Jose Marcos Domingues, *Environmental Fees and Compensatory Tax in Brazil*, 13 LAW & BUS. REV. AM. 279 (2007)
<https://scholar.smu.edu/lbra/vol13/iss2/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ENVIRONMENTAL FEES AND COMPENSATORY TAX IN BRAZIL*

*José Marcos Domingues**

ABSTRACT

This paper introduces the Brazilian tax system and presents a retrospective of Brazil's environmental taxation as well as current Congressional proposals, while focusing on the special case of environmental fees recently established at the federal, state, and municipal levels. Any political entity is entitled to levy fees for its respective specific public services, including those related to the exercise of police power (monitoring, inspection, etc.). After the establishment of the controversial federal EPA's fee in 2000, which was upheld by the Supreme Court in 2005, lawmakers have created an increasing number of environmental fees. Also in 2000, Brazil instituted an environmental compensatory tax called the Sistema Nacional de Unidades de Conservação (SNUC) compensation. As the very first Brazilian environmental tax of its kind, its constitutionality is yet to be tested.

This paper also discusses many controversial issues, such as the tax legality principle in relation to typification and administrative discretion, concurrent competence vis-à-vis adequacy of taxable events, taxable basis (including fee-revenue set-off), and retroactive tax enforcement. Finally, this paper presents the author's views on the perspectives of Brazil's environmental taxation as an economic instrument for sustainable development and sound environmental public policy.

I. INTRODUCTION

THE underlying inspiration of environmental law is the preservation of human life on earth through sustainable development. The right to exist is the basic motivation of Environmental Law. The world has seen a series of declarations of intent in the last fifty years ranging from ratification to denials of those proposals. For instance, the

* Presented at the 7th Annual Global Conference on Environmental Taxation, Ottawa, Canada, October 22-24, 2006.

** LL.B. 1977, Rio de Janeiro State University; Faculty of Law, Professor, Public Financial Law, Fulbright Fellow (Environmental Law Comparative Seminar, in the United States, 1990; Visiting Professor, Kwansei Gakuin University, Japan, 2003; Visiting Professor, Washington & Lee University School of Law, Spring 2006 (Latin-American Public Law and Brazilian Business Law). The author may be contacted at: jm.domingues@globo.com.

Stockholm Protocol of 1972 addressed environmental protection, whereas the Rio de Janeiro ECO-92 Summit debates centered around environment and development and focused on humankind. And the Kyoto Protocol of 1997 proposed reductions of pollutant emissions.

This has been a time for deep ethical reflections on what we are, what we want for humankind, and what we should do to benefit future generations. There is a preliminary perspective regarding human rights and the environment where, according to Argentinean Professor Santiago Felgueras, environmental degradation may "ultimately hinder the exercise of rights already recognized . . . such as the right to live and the right to health . . . even other rights such as cultural rights and the minorities' rights."¹ In fact, what seems to be at stake are nothing less than the most important values—human life and human life with dignity.

Today the environment raises some fundamental questions connected to political and economic issues. The first issue relates to human rights and the environment within the spectrum of north-south relations. The question involves industrialization and development of a few at the cost of de-industrialization and underdevelopment of many others, causing an increasing degradation of the quality of life standards in most parts of the planet. Yet this is not a new or recent issue. The tension between development, exploitation of natural resources, and people (notwithstanding the human right to a healthy, clean environment) is an old problem that dates back to the Roman Empire, the Great Navigations, colonialism, and liberalism. It also relates to tariff and non-tariff trade barriers imposed by developed countries in times of neo-liberal globalization. After all, if natural resources and poverty are found in the same places, one may reasonably ask whether the resources of the so-called third world are being developed for the benefit of its people.

The second issue refers to the environmental costs of economic development and sustainable development. Today there is a consensus that non-sustainable development is not development, for it disrupts the environment and threatens life.

The third issue addresses environmental awareness. This concerns people's awareness, general education, and environmental education in particular. It calls for governmental awareness and deals with the conflicts of interests between the governments' economic and environmental agencies, such as related budgetary disputes (e.g., earmarking, non-earmarking of revenues, tax neutrality, and environmental taxation credibility). Environmental awareness also relates to internal environmental costs, where businesses' accounting of environmental protection measures is reflected in the prices of goods. Finally, environmental awareness raises questions about the use and the usefulness of economic instruments to benefit environmental protection and sustainable development.

1. SANTIAGO FELGUERAS, *DERECHOS HUMANOS Y MEDIO AMBIENTE* 17 (AD-HOC 1996) (translated by the author).

Of course, one must also pay attention to administrative instruments for environmental protection. Command-and-control, regulation, licensing, monitoring, auditing, and fining are traditional tools based on police power. Police power can be described as the power (but also duty) to regulate individual rights in light of the public interest.

II. ECONOMIC INSTRUMENTS FOR ENVIRONMENTAL PROTECTION

Environmental doctrines recognize subsidies, tradable permits, deposit-refunds, and environmental taxation as adequate economic instruments to enhance environmental protection.

Subsidies or subsidized funding are direct or indirect government grants to economic agents engaged in an activity relevant to the public good and thus deserving of state support.

Tradable permits are market mechanisms that allow environmentally efficient companies to sell their under-used polluting licenses (trade-off of permits) to technologically outdated companies.² A similar device has been introduced by the Kyoto Protocol that allows companies of designated countries (listed in Annex 1) to invest in projects aimed at reducing polluting-emissions in developing countries and to receive (buying-in-exchange-for) the respective environmental certificates then used for accounting for the respective environmental efforts/goals in their home countries.

A deposit-refund is a device whereby a part of the price of dischargeable goods (such as razor blades, batteries, packing material) is repaid to the consumer. This tool may work both as a legally allowed private over-price, or as a tax. For example, the tax created by the Belgium law of July 16, 1993, is due on practically all purchases of dischargeable products, but the tax is not due, or if due it is refundable, for purchases of recyclable items, thus operating as a tax incentive.

Environmental taxes are fiscal tools derived from state power to collect financial compulsory contributions from those who fall under its authority aiming at funding state actions. These taxes have either a broad or narrow meaning, depending on whether they are charged on direct use of the environment or on ordinary situations only indirectly connected to the former.

Economic instruments are fundamentally based on a general principle

2. EDWARD KORMONDY, *INTERNATIONAL HANDBOOK OF POLLUTION CONTROL* (Greenwood Press 1989); STEPHEN SMITH & HANS B. VOS, *EVALUER LES INSTRUMENTS ÉCONOMIQUES DES POLITIQUES DE L'ENVIRONNEMENT* (Organisation for Economic Co-operation and Development 1997). Trade-offs are still an incipient tool in many countries. The Kyoto Protocol stimulates their use, but Japan, for instance, has recently postponed decision on on-going studies for implementation thereof. Mick Corliss, *Emissions-Trading Plan Put on Back Burner*, *THE JAPAN TIMES*, Jan. 18, 2002, at 3. "[T]rading regimes are going online around the world. And some commentators worry that Japan is falling behind the curve." *Id.*

of environmental law, known as the polluter-pays principle.³ This principle has a positive meaning (polluter imputation of the costs of environmental public services) and a selective meaning (modulating or adjusting said cost imputation according to the intensity of pollution).⁴

III. THE BRAZILIAN TAX SYSTEM

The Federative Republic of Brazil is a federation, instituted in 1889, and it succeeded the Empire of Brazil, as the country had been known since its independence from the Kingdom of Portugal in 1822.

Today, the Brazilian tax system is basically provided for in title VI, chapter I, articles 145 through 156 of the Federal Constitution of October 5, 1988, as amended.⁵ It distributes the taxing power directly to the federal, state, and municipal governments because they⁶ ought to be politically and financially autonomous.⁷ Thus in Brazil, there is no delegation of taxing power to local governments, but a direct constitutional grant of local taxing power.

Also, the Brazilian Constitution, following the American tradition, expressly indicates incumbencies to be exercised by the federal government, reserving residual powers to be exercised by states.⁸ The Constitution also refers to those parochial interests governed by municipal authorities.⁹

The Brazilian tax system consists of three basic types of tributes:¹⁰ *im-*

-
3. "Il (le principe pollueur-payeur) est inspiré par la théorie économique selon laquelle les coûts sociaux externes qui accompagnent la production industrielle (dont le coût résultant de la pollution) doivent être internalisés c'est-à-dire pris en compte par les agents économiques dans leurs coûts de production." MICHEL PRIEUR, *DROIT DE L'ENVIRONNEMENT* 123 (Daloz 1991). Note that the greater the cost share borne by the polluter, the greater the adherence to the polluter-pays principle. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE POLLUTER-PAYS PRINCIPLE: DEFINITION, ANALYSIS, IMPLEMENTATION* 6 (1975).
 4. JOSE MARCOS DOMINGUES, *DIREITO TRIBUTÁRIO E MEIO AMBIENTE: PROPORCIONALIDADE, TIPICIDADE ABERTA, AFETACAO DA RECEITA* 17-27 (Renovar 2d ed. 1999).
 5. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] arts. 145-46 (Braz.).
 6. Due to a Portuguese tradition of recognizing a strong voice in city councils, Brazilian municipalities have become a party to the Federation beside member states and the federal district. *Id.* at art. 1.
 7. *Id.* at art. 25 (states' powers); *id.* at art. 30 (municipalities' powers).
 8. *Id.* at art. 25 ¶ 1.
 9. *Id.* at art. 30.
 10. *Tributo* is the general word used in Portuguese in the same sense as *abgabe* is used in German. The National Tax Code specifies that the taxable event of an *imposto* (impost) is a situation not connected to any state action referred to the taxpayer, and that the taxable event of a *taxa* (fee) is the exercise of administrative police power or the actual or potential use of specific public service rendered to the taxpayer or put at the disposal of the same. CÓDIGO TRIBUTÁRIO NACIONAL [C.T.N.] arts. 16 & 77 (Braz.), available at https://www.planalto.gov.br/ccivil_03/eis/L5172Compilado.htm. Finally, the taxable event of a betterment assessment is the appreciation of real estate property value due to public works in its vicinage. *Id.* at arts. 16 & 81.

postos,¹¹ which are imposts on general expressions of wealth; *taxas*,¹² which are fees levied by virtue of police power or for the actual or potential use of specific and divisible public services rendered to taxpayers or made available to them; and *contribuições de melhoria*,¹³ which are betterment assessments levied on the appreciation of private real estate property due to public works.

Since the eighteenth amendment to the Federal Constitution of 1946, dated December 1, 1965,¹⁴ Brazilian tributes have been statutorily classified in the foregoing three basic categories according to their respective *fatos geradores* or taxable events (or *steuertatbestand*).

Besides, in article 148, the Brazilian Constitution also provides that the federal union may institute *empréstimos compulsórios*,¹⁵ which are compulsory loans to defray extraordinary expenses resulting from public calamities, foreign war or imminence thereof, and in the event of a public investment that is urgent and of relevant national interest. The federal union may also institute *contribuições parafiscais*¹⁶ (parafiscal contributions).¹⁷

Regarding federal taxes (imposts), article 153 provides for the exclusive federal competence to impose taxes (*impostos*) on: imports of foreign products; exports to other countries of national or nationalized products; income and earnings of any nature; industrialized products; transactions of credit, foreign exchange and insurance or transactions with instruments and securities; rural land; and large assets.¹⁸

Also, article 154 provides for the exclusive federal competence to establish extraordinary war taxes upon the imminence of foreign war, whether or not such competence is included in its ordinary taxing power.

11. *Impostos* as “[t]axes, duties, or impositions levied for divers reasons” is the specific Portuguese word for the German word *steuer*. Cf. BLACK’S LAW DICTIONARY 756 (6th ed. 1990).

12. *Taxa*, which corresponds to the German *gebühr*, may not have assessment basis reserved for *impostos*. C.F. at art. 145 ¶ 2.

13. *Contribuição de melhoria* roughly corresponds to the German *erschliessungsbeitrag*; but its amount may not exceed the amount of the appreciation of private property derived from relevant public works concerned.

14. Before this date, Decree-Law number 2.416, of July 17, 1940, had defined *imposto* or impost as “the tribute the purpose of which is to attend general needs of the Public Administration”, and *taxa* or fee as “the tribute collected in payment for specific public services rendered to the taxpayer or made available thereto, or the contribution the purpose of which is to fund special (public) actions arising from the public interest or from given groups of individuals.” Decreto No. 2.416, de 17 de julho de 1940 (Braz.) (translated by the author). Doctrinal criticism on the above legislation may be seen in Rubens Gomes de Sousa, *Compêndio de Legislação Tributária*, RESENHA TRIBUTÁRIA, 1975, at 163-69 (Sao Paulo, Braz.) (edição póstuma).

15. *Empréstimo compulsório* is the Portuguese equivalent to the French *emprunts forcés*, or the German *zwangsleihe*.

16. *Contribuição parafiscal* is the Portuguese equivalent to the French *contribution parafiscal* and the German *parafiskalischebeitrag*.

17. Local governments have a minor competence to establish local contributions. C.F. at art. 149.

18. *Id.* at art. 153.

The federal union may also establish taxes not listed in article 153, provided they are non-cumulative and have a specific taxable event or tax basis other than those falling within the respective exclusive taxing competences of the states, the federal district, or the municipalities.¹⁹

Article 155 provides for the exclusive competence of the states and of the federal district to impose taxes (*impostos*) on: inheritance and gifts; transactions relating to the circulation of goods, the rendering of inter-state and inter-municipal transportation services, and communication services; and ownership of automotive vehicles.²⁰

Finally, article 156 provides for the exclusive competence of municipalities to impose taxes (*impostos*) on: urban real estate; the transfer of real estate property rights on any account and for consideration; and the rendering of services other than those mentioned in article 155 (which are taxed by the states and the federal district).²¹

The Brazilian National Tax Code provides for the distinction among tributes, such as imposts and fees. The distinction may be found directly or indirectly in other countries' tax codes, such as the German *abgabe-nordnung*, the Spanish *ley general tributaria*, and the legislation of major Latin American countries following the Model Tax Code for Latin America.²²

Another primary function of the National Tax Code is to make clear the basic principles of the tax system, such as the meaning of tax legality, tax equality, tax immunity, tax-exemption criteria, and standards for solving conflicts of taxing power among the three levels of government.

Pursuant to the provision of article 146 of the Brazilian Constitution, the National Tax Code shall (I) provide for the resolution of conflicts of taxing power among the federal union, the states, the federal district, and the municipalities; (II) "regulate the constitutional limitations on the power to tax;" and (III) establish tax law general standards, particularly regarding (a) "the definition of tributes and their types," and, in regard to those imposts specified in the "Constitution, the definition of the respective taxable events, assessment bases and taxpayers" thereof; (b) tax obligation, assessment, credit, statute of limitations, and laches; and (c) "adequate tax treatment for" cooperatives.²³

In fact, the National Tax Code has provided for the following matters: definitions of tributes and their types; taxing power and administrative tax enforcement; limits of the taxing power, including tax immunities; compulsory loans and war taxes; characteristics (taxable events and tax bases) of tributes; tax law general standards, covering matters such as the meaning of tax legislation (including tax treaties and their efficacy), char-

19. *Id.* at art. 154.

20. *Id.* at art. 155.

21. *Id.* at art. 156.

22. The Model Tax Code for Latin America was drafted in the 1960s under the auspices of the Inter-American Development Bank and the American States Organization.

23. C.F. at art. 146.

acteristics of the tax legality principle,²⁴ limits of administrative regulation, guidance and interpretation of tax law, tax obligation, taxable events, taxpayers and creditors of a tax obligation, tax liability of taxpayers and of third parties, tax assessment, payment and refund of taxes, statute of limitation and laches, tax exemption, tax moratorium and tax amnesty, guarantees and privileges of tax rights, and tax administration.

The National Tax Code has been crucial to Brazil as to other Latin American countries built upon heterogeneous cultural and political backgrounds.

In short, according to the Brazilian tax system, imposts are levied on wealth in the forms of capital, income, and consumption. Fees are basically due in relation to the rendering of compulsory specific public services, such as licensing, inspections, and court procedures. Betterment assessments are levied on the basis of real estate value appreciation due to public works in the respective vicinage.

IV. ENVIRONMENTAL TAXATION AND THE BRAZILIAN TAX SYSTEM

Environmental taxation is a category that has been in the forefront of economic and legal research for the past thirty years. Yet there is still a hard discussion going on as to its scientific soundness. But even when it is theoretically accepted, there is little consensus as to how it should be put into operation.

Green taxes are technically designated environmental taxes. The label of green tax refers to taxes that have environmental-friendly motivation. These taxes may be understood as having both a broad and a narrow meaning.

The broad meaning of an environmental tax is that of an ordinary or traditional tribute adapted so as to benefit environmental protection efforts. The narrow or strict meaning is that of a new, separate tribute charged on the use of the environment by economic actors.

Making environmental taxes work is the issue. Professor Herrera

24. The following may only be set forth by law:

I - imposition of tributes, or abolishment thereof;

II - increase of tributes or reduction thereof . . . ;

III - definition of taxable events of main tax obligations . . . as well as the definition of the relevant debtor;

IV - establishment of the tax rate and its assessment basis . . . ;

V - imposition of penalties for actions or omissions contrary to law provisions or other violations defined therein;

VI - cases in which the tax credit may be excluded, suspended and extinguished, cases for dismissal or reduction of the penalties.

§ 1º Any change in the tax assessment basis to the effect of increasing its amount is held equivalent to the increase of the tax.

§ 2º For the purposes of the provisions of item II of this article, the monetary adjustment of the value of relevant assessment basis does not constitute increase of the tax.

C.T.N. at art. 97 (translated by the author).

Molina²⁵ advised that environmental regulation, like environmental taxation, is of a transversal or polycentric character (and interdisciplinary) because it deals with multiple and conflicting interests.

Taxes were originally conceived as an instrument to transfer private resources to the treasury to cope with public expenditures. When taxes serve this function, they are referred to as fiscal or financial (*finanzsteuer*) taxation (hence, fiscal revenues), which correspond to a non-regulatory state policy. In other words, they relate to neutral public finances, which were glorified by the *laissez faire, laissez passer*.

But taxes may exercise a great influence over economic activity, for they are one of the main costs of businesses. Taxes may be used as an indirect regulatory (*ordnungsteuer*) economic instrument. For example, an activity or product that is highly taxed may be discontinued in favor of activities subject to lower taxes rates. Maybe the oldest example of this kind of tax is the tariff barrier to protect the domestic industry. The old Gauls used tariff barriers against the Romans, mercantilism made widespread use of them, and even nowadays they are used, along with non-tariff barriers, to hamper free competition in closed markets.

In this latter sense, taxes are referred to as non-fiscal or extra-fiscal²⁶ taxation because they do not aim at raising funds for public expenditure (some would aim at no tax collection at all as the true tariff barrier). Instead, the goal of non-fiscal taxation is to direct the economy and focus on political goals. Non-fiscal taxes are also regulatory taxes, *taxes d'orientation*, or *Marktordnungsabgaben*,²⁷ because, in the words of Professor Xavier Oberson, as *zwecksteuern* they are "money having the goal of affecting taxpayers' attitudes."²⁸

Environmental taxes may have both a fiscal function (which corresponds to the positive meaning of the polluter-pays principle) and an extra-fiscal function (which corresponds to the selective meaning of the principle), even though they are basically of a regulatory nature. Their main goal is to change the taxpayers' (businesses and consumers) behaviors; in other words, they mostly aim at producing or enhancing environmental awareness.

Of course fees and betterment assessments have basically a fiscal function, but imposts (taxes on capital, income, and consumption) are those most effective not only for fund raising but also for economic regulation, because imposts may be levied on every stage of the economic chain.

25. PEDRO MANUEL HERRERA MOLINA & CARLOS PALAO TABOADA, DERECHO TRIBUTARIO AMBIENTAL: LA INTRODUCCION DEL INTERES AMBIENTAL EN EL ORDENAMIENTO TRIBUTARIO 185 (2000).

26. HEINRICH WILHELM KRUSE, DERECHO TRIBUTARIO: PARTE GENERAL 68-69 (Perfecto Yebra Martul-Ortega & Miguel Izquierdo Macias-Picavea. trans., Derecho Reunidas ed., 1978).

27. XAVIER OBERSON, LES TAXES D'ORIENTATION: NATURE JURIDIQUE ET CONSTITUTIONNALITÉ 23 (Ba'le: Helbing & Lichtenhahn 1991).

28. *Id.* at 23-24 (translated by the author).

Brazilian federal imposts have been traditionally used for the purpose of creating a green tax system through broad-sense environmental taxes. Industrialized-products tax (IPI) rates²⁹ charged on certain gasoline-run vehicles have varied between 25 and 30 percent, whereas alcohol-run vehicles are charged at between 20 and 25 percent. Also, the federal tax on rural land is not charged on private forestall reserves.³⁰ And the Agricultural National Policy Act³¹ establishes the protection of the environment, the incentive to its rational use, and environmental reclamation as some of its goals, listing among the respective governmental instruments taxation and fiscal incentives. Federal laws have created tax incentives for forestation and reforestation,³² and for recycling.³³ In the first case, of forestation and reforestation, the law grants deductibility up to 50 percent of the income tax due of the amount invested by the taxpayer.³⁴ As to the latter case, in 2002 the law granted an *à-forfait* IPI tax credit in consideration of purchases of tax-free plastic rejects due for recycling.³⁵

States have also experienced the green influence on their taxes. Inter-state Agreement number 101 of December 12, 1997 (in force until April 30, 2007) granted state sales-tax exemption for nationwide sales of equipment for solar and eolian energy conversion.³⁶

Rio de Janeiro state grants a one-third sales-tax reduction for domestic sales of equipment for construction, relocation, or modernization of industrial or agro-industrial plants that aim at environmental protection.³⁷ Also, automobile tax³⁸ rates on natural gas or electric-energy-run vehicles (1 percent) or on alcohol-run vehicles (2 percent) are substantially lower than those charged on gasoline-run ones (4 percent).

São Paulo state's automobile-tax³⁹ rates also vary according to fuel usage: 3 percent (against 4 percent standard rate) in the case of alcohol, natural gas, or electricity; and 6 percent for cars run on diesel oil.

Rio de Janeiro city exempts lots and buildings that are relevant for landscape or environmental preservation from urban property tax.⁴⁰ Ex-

29. Decreto No. 755, de 19 de fevereiro de 1993, D.O.U. de 20.2.1993 (Braz.).

30. Lei No. 9.393, de 19 de dezembro de 1996, D.O.U. de 20.12.1996 (Braz.).

31. Lei No. 8.171, de 17 de janeiro de 1991, D.O.U. de 18.1.1991 (Braz.), *amended by* Lei No. 9.712, de 20 de novembro de 1998, D.O.U. de 23.11.1998 (Braz.).

32. Lei No. 5.106, de 2 de setembro de 1966, D.O.U. de 5.9.1966 (Braz.).

33. Medida Provisória No. 75, de 24 de outubro de 2002 (not converted into a statute).

34. Lei No. 5.106.

35. Medida Provisória No. 75.

36. Convênio ICMS No. 101, de 12 de dezembro de 1997, D.O.U. de 18.12.1997 (Braz.).

37. Lei No. 2.055, de 25 de janeiro de 1993, (12% of selling price, against 18% in the case of ordinary sales). In this respect, *see* DOMINGUES, *supra* note 4, at 51.

38. Lei No. 948, de 26 de dezembro de 1985, D.O.E. de 27.12.1985 (Braz.), *amended by* Lei No. 3.355, de 29 de dezembro de 1999, D.O.E. de 30.12.1999 (Braz.).

39. Lei No. 6.606, de 20 de dezembro de 1989, D.O.E.S.P. de 21.12.1989 (Braz.), *amended by* Lei No. 7.644, de 23 de dezembro de 1991, D.O.E. de 24.12.1991 (Braz.) & Lei No. 9.459, de 16 de dezembro de 1996, D.O.E. de 17.12.1996 (Braz.).

40. Lei No. 691, de 24 de dezembro de 1984, Código Tributário Municipal, DORJ IV - SUPLEMENTO 1984/12/26 (Braz.).

amples of exempt land include designated forestall reserves and any lots bigger than 1 hectare effectively covered by forests.

Several legislative initiatives have been taken in the national Congress aiming at introducing other broad environmental tax measures. Some examples include: PL 6262/05, of the House of Representatives—IPI exemption for environmental-quality certified products; PL 3637/04, of the House—income tax reduction in proportion to the usage of recycled materials; PL 3955/04, of the House—deduction in double (as operational expenses or costs) of the amount invested in purchasing and installing equipment for pollution reduction (limited to 15 percent of taxable profit); PL 3955/04, of the House—IPI exemption for non-polluting equipment, machinery, and apparatus coupled with the saving of the tax credit on the respective inputs; PL 5501/01, of the House—50 percent reduction of IPI on recyclable packing; PL 1760/99, of the House—IPI exemption for products the manufacturing cost of which is formed with more than 50 percent in recycled raw materials; and PLs 5162/05 and 5974/05, of the Senate—special deduction (up to 40 percent) of amounts donated to non-profit entities in connection to projects intended to promote the sustainable use of natural resources and environmental preservation, limited to 4 percent of income tax due.⁴¹

Despite these representative efforts towards environmental preservation, the big challenge today is to further advance the establishment of a new kind of environmental tax (some would say a true environmental tax) in its narrow or strict sense. So far, Brazil has not established strict-sense environmental taxes on pollution (emissions, rejects, and effluents). The one attempt that has been made is under scrutiny for its constitutionality before the Federal Supreme Court.

V. FEES, TAX SYSTEM, AND ENVIRONMENTAL FEES IN BRAZIL

The Brazilian tax system reflects the special characteristic of the Brazilian Federation, consisting of the association of the member states, the municipalities, and the federal district (the Union's Capitol).⁴² All three political entities have the institutional power from the Federal Constitution to establish their own taxes, including fees for public services.

According to the Constitution⁴³ and the Tax Code,⁴⁴ fees may be charged for the exercise of police power and where a specific and divisible public service is rendered or put at the disposal of the individual taxpayer. According to legal doctrine, the amount of such police fees and service fees must keep a reasonable equivalence with the respective taxable events, the taxable basis of which must be the former's economic ex-

41. PL stands for *Projeto de Lei* (a proposed bill).

42. C.F. at art. 1.

43. *Id.* at art. 145 § II.

44. C.T.N. at art. 77.

pression.⁴⁵ So the proportionality principle must govern the statutory legal criteria provided for the fee assessment.

In the case of environmental fees, there must be a connection between the activity of the economic agent (the taxpayer) and the amount of the corresponding public service (the taxable event).⁴⁶

Police fees are mostly due in regard to audits, inspections, and licenses intended to verify or control whether entrepreneurial activities meet pollution and other environmental administrative standards. License fees have been designated tolerance fees⁴⁷ because they are related to the exercise of administrative control as to the level of pollution tolerated by society.

VI. FEES IN BRAZILIAN LAW

The Brazilian Tax Code defines the taxable event of fees as those charged by the union, the states, the federal district, and the municipalities that must fall "within the respective incumbencies."⁴⁸ This is because the Brazilian tax system⁴⁹ corresponds to a constitutional division of administrative competences among the union, the states, the federal district, and the municipalities.⁵⁰

Thus the tax competence as to fees is held in common by the political entities, provided they perform their taxable event (public service) within their respective administrative incumbencies, which in turn function as a reciprocal limit of the taxing power.

Following the American constitutional tradition, Brazilian federal competences (related to the national interest) are listed⁵¹ in articles 21 and 22 of the Constitution. The municipal competences are limited by the local interest (article 30 of the Constitution), while remaining residual powers are reserved to member states, (article 25, section 1, of the Constitution) without limitation to other designated incumbencies.⁵²

The "oldest of administrative expressions," the police power has diversified itself and brought the environmental police into scene as its specialized branch for the purposes of controlling the use of the environment by

45. AMÍLCAR FALCÃO, *FATO GERADOR DA OBRIGAÇÃO TRIBUTÁRIA* 138 (Revista dos Tribunais ed., 4th ed. 1977).

46. Brazilian Supreme Court case law has upheld the service-cost requirement doctrine. See *RE-Recurso Extraordinário* No. 102.524, publ. *Diário da Justiça* of Nov. 8, 1994 (Braz.); *Rep.-Representação* No. 1.077, publ. *Diário da Justiça* of Sep. 28, 1984 (Braz.).

47. Pedro Manuel Herrera Molina & Domingo Carbajo Vasco, *Marco General Jurídico de la Tributación Medioambiental: Concepto, Marco Constitucional y Marco Comunitario*, in *TRIBUTACIÓN MEDIOAMBIENTAL: TEORÍA, PRÁCTICA Y PROPUESTAS* 61, 99 (2004).

48. C.T.N. at art. 77 (translated by the author).

49. C.F. at arts. 145 §§ II & III, 153, 155, 156; see also *id.* at arts. 20, -32.

50. C.T.N. at arts. 21, 22, 25, 30 & 32.

51. Cf. TOSHIO MUKAI, *DIREITO AMBIENTAL SISTEMATIZADO* 17 (Forense Universitária, 2d ed. 1994).

52. C.F. at arts. 25, 30.

individuals and legal entities.⁵³ In general, the respective police fees aim at financing the cost of public services connected thereto.⁵⁴ They are charged in order to reimburse the state for the cost incurred in the activity that the relevant taxable event is connected to.⁵⁵

Environmental fees are governed by the above principles that theoretically justify their institution in Brazil. Thus, a fee must correspond to a federal, state, or municipal public service rendered by the competent entity. The question becomes the scrutiny of administrative incumbencies that, exercised in a legitimate manner, may supply good grounds for the institution of fees.

The classic criterion for such administrative *discrimen*, especially concerning police power,⁵⁶ rests in the legislative material competence attributed to the Constitution. In principle, the political entity entrusted therewith shall be entitled to render the respective public services and thus to institute the corresponding fees. Although in principle there should not be overlaps in administrative competences,⁵⁷ this situation may occur in the presence of a convergence of different federative interests⁵⁸ around the same protected asset or good, in which case the exercise of more than one police power justifies the exaction of the respective fees. From the tax viewpoint, this situation may lead to double or multiple taxation provided that more than one political entity exercises their respective shares of police power, which is the taxable event for fees.⁵⁹

This is precisely what may happen in the domain of environmental police power because the Brazilian Constitution⁶⁰ provides that it is incumbent upon the government (at all three federative levels) to defend and preserve the environment. The Constitution entrusts all political entities with concurrent legislative powers regarding environmental matters.⁶¹ But these prerogatives are mutually limited by the respective national,

53. DIOGO DE FIGUEIREDO MOREIRA NETO, *CURSO DE DIREITO ADMINISTRATIVO: PARTE INTRODUCTÓRIA, PARTE GERAL E PARTE ESPECIAL* 338 (Forense, 7th ed. 1989) (translated by the author).

54. ALIOMAR BALEEIRO, *UMA INTRODUÇÃO A CIÊNCIA DAS FINANÇAS* 3 (16th ed. 2004) (translated by the author).

55. LUIZ EMYGDIO FRANCO DA ROSA JÚNIOR, *MANUAL DE DIREITO FINANCEIRO & DIREITO TRIBUTÁRIO* 250-51 (Renovar, 6th ed. 1995).

56. CELSO ANTÔNIO BANDEIRA DE MELLO, *CURSO DE DIREITO ADMINISTRATIVO* 575 (Malheiros, 11th ed. 1999).

57. Luis Roberto Bartoso, *A Proteção do Meio Ambiente na Constituição Brasileira*, 44 *REVISTA DE DIREITO DA PROCURADORIA-GERAL DO ESTADO DO RIO DE JANEIRO* 41, 57 (1992).

58. For instance, the Tijuca Forest located in Rio de Janeiro City is a national park, a reserve of the Atlantic Rain Forest, and an object of national interest. The dimensions of this forest influence the climate of Great Rio, the inter-city metropolitan region (attracting state interest); and it has a unique landscape and tourist value for the city of Rio de Janeiro (municipal interest), not limited to a strictly environmental interest. C.F. at art. 225 § II.

59. Flávio Bauer Novelli, *Apontamentos sobre o Conceito Jurídico de Taxa*, 45 *REVISTA DE DIREITO DA PROCURADORIA-GERAL DO ESTADO DO RIO DE JANEIRO* 93, 100-101 (1992).

60. C.F. at arts. 23, 225.

61. *Id.* at art. 24 §§ VI-VIII.

state, or local interests, which ought to be attended to by the union, the states, and the municipalities.⁶² The administrative activity should not lead to federative conflicts and waste of financial resources.⁶³

The Constitution requires that Congress set down general rules promoting cooperation among the political entities, aimed at the attainment of balanced development and well-being nationwide.⁶⁴ The National Environmental Policy Act (NEPA), Law number 6.938, of 1981, required⁶⁵ that Congress enact general rules for solving conflicts of taxing competences among the political entities. This is important regarding fees (and environmental fees) for the respective public services. The National Tax Code⁶⁶ helps taxpayers avoid being taxed by a government that has not been granted the specific taxing power.

VII. ENVIRONMENTAL FEES OF THE BRAZILIAN INSTITUTE OF ENVIRONMENT AND RENEWABLE NATURAL RESOURCES (IBAMA)⁶⁷

Keeping in mind the federative and subsidiary principles,⁶⁸ NEPA recognizes member-states' competence to perform environmental licensing, which falls within the scope of general police power (the environmental police power, as already noted).⁶⁹ But IBAMA is empowered to perform licensing of businesses having a national or regional (interstate) impact.⁷⁰ Also, federal subsidiaries are mentioned throughout NEPA, which provides for federal auditing and control where states and municipalities have failed to perform their environmental police duties.⁷¹

Originally, NEPA did not create any environmental taxes. It was only in 2000 that they were established.⁷²

A. THE FEE OF ARTICLE 17-A

Under article 17-A, "there are hereby established the prices for services and products of IBAMA, to be applied nationwide, pursuant to the

62. MANOEL GONÇALVES FERREIRA FILHO, *DIREITO CONSTITUCIONAL ECONÔMICO* 125 (Saraiva ed., 1990).

63. PAULO JOSÉ LEITE FARIAS, *Competência Federativa e Proteção Ambiental* 316 (Fabris 1999).

64. C.F. at art. 23 sole paragraph.

65. *Id.* at art. 146 § I. Lei No. 6.938, de 31 de agosto de 1981, D.O.U. de 2.9.1981 (Braz.) [hereinafter NEPA].

66. See ELCIO FONSECA REIS, *FEDERALISMO FISCAL: COMPETENCIA CONCORRENTE E NORMAS GERAIS DE DIREITO TRIBUTARIO* 127 (Belo Horizonte: Mandamentos 2000).

67. IBAMA stands for Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis, http://www.ibama.gov.br/novo_ibama/index.php?.

68. C.F. at art. 25 (stating "All powers that this Constitution does not prohibit the States from exercising shall be conferred upon them") (translated by the author).

69. NEPA at art. 10.

70. *Id.* at art. 10 § 4.

71. *Id.* at arts. 10, 11, 14.

72. Lei No. 9.960, de 28 de janeiro de 2000, D.O.U. de 29.1.2000 (Braz.); Lei No. 10.165, de 27 de dezembro de 2000, D.O.U. de 28.12.2000 (Braz.).

Enclosure hereto to this Law.”⁷³

Article 17-A provides for the collection of prices in consideration for IBAMA’s services and products listed in an enclosure to NEPA.⁷⁴ The law labels payments for several administrative licenses, licensing, registrations, authorizations, inspections, etc., as *preços*, (prices) when such payments are clearly police fees that commonly correspond to audit or inspection actions such as the environmental licensing process, the conditions of which, if disobeyed, shall bring about the respective liability for unlawful conduct.⁷⁵ The above statutory provision falls within the concept of a fee (tribute) paid for compulsory public services.⁷⁶ It should be noted that the Tax Code follows the tax doctrine according to which the wrong statutory designation of a tribute does not affect the respective juridical nature that arises from its taxable event.⁷⁷ This doctrine has been supported by case law.⁷⁸

Clearly article 17-A has instituted police fees vis-à-vis the topical exercise of police power provoked by the taxpayer in need of legally required licenses, authorizations, inspections, registrations, etc., similar to fees paid for the issuance of a patent or an annual automobile inspection. Those fees may only be charged by the federal environmental authority when lawfully exercising its administrative competence, which happens in only two cases: (1) when states and municipalities have failed to perform their environmental police duties and (2) when the taxpayer’s activity produces a regional or national impact—where the federal interest is at stake, thus justifying a federal service and the collection of the respective fee. States and municipalities may also collect similar fees for the respective environmental services.

Charging the above fees for licensing and registration does not prevent governments from collecting other police fees for environmental monitoring or control, in light of the permanent services of inspection of potentially polluting activities—licensed or not—either spontaneously, upon notification (dwellers, NGOs, etc.), or pursuant to routine double-checking of entrepreneurial information to the environmental authority. The monitoring and inspection competence must be statutorily stated, the same being required of the typification of the taxable event of the respective fee. In such cases, environmental authorities must have the potential ability to intervene *ex officio*, which requires the actual existence of a ready-to-act structure so as to enhance its deterrent or repressive capabilities. In the absence of such a structure, police power cannot be exer-

73. Lei No. 9.960 at art. 17-A (translated by the author).

74. Previous attempts to establish a list of fees designated by prices by administrative normative acts were voided by the Federal Supreme Court. ADI No. 1.823-DF, 22/98 Repertório IOB de Jurisprudência 560 (Braz.).

75. Cf. EDIS MILARÉ, *DIREITO DO AMBIENTE: DOCTRINA, PRÁTICA, JURISPRUDÊNCIA*, GLOSSÁRIO 261 (Revista dos Tribunais ed., 2000).

76. C.T.N., at arts. 3, 77, 114.

77. *Id.*

78. Cf. Súmula No. 545 of the S.T.F. (Braz.), available at www.stf.gov.br.

cised, and thus the taxable event of the respective fee shall be deemed as to not occur.

B. THE FEE OF ARTICLE 17-B (ENVIRONMENTAL CONTROL AND INSPECTION FEE)

Article 17-B states, "It is hereby instituted the Control and Inspection Environmental Fee – TCFA, the taxable event of which is the regular exercise of the police power conferred upon IBAMA for controlling and inspecting activities which use natural resources and are potentially polluting."⁷⁹

Law number 10.165 of 2000 has tried to legitimize previous administrative ordinances, decrees, and statutory provisions aiming at empowering IBAMA to collect a general environmental control and inspection fee due not only in the case of an effective or topical deployment of the environmental police services (covered by article 17-A as discussed earlier) but which would be also due in case of potential or deterrent use of police power (article 17-B). In trying to typify the taxable event of the above fee as "the regular exercise of police power entrusted to IBAMA for controlling and inspecting potentially polluting activities and those which use natural resources," article 17-B neither identifies which concrete actions or measures can be taken by IBAMA nor names the circumstances under which the respective administrative acts ought to be performed.⁸⁰

Because the Constitution upholds the legality principle, it requires that the actual institution of a tribute (fee) be done through a statute⁸¹ describing the taxable event (that is to say, which police act⁸² is to be performed by the administration under certain circumstances),⁸³ as required by legal doctrine,⁸⁴ for "depending on the police act exercised there shall be a specific fee."⁸⁵

The above doctrine is especially important when coupled with the federative principle that requires that competences held in common (which is the case of environmental protection) must be exercised within the limits reciprocally balanced by federal, state, and municipal interests. As already noted, the Constitution requires that Congress sets down general

79. Lei No. 10.165 at art. 17-B (translated by the author).

80. *Id.* (translated by the author).

81. See C.F. at art. 150; C.T.N. at arts. 97 § III, 114.

82. RÉGIS FERNANDES DE OLIVEIRA, *TAXAS DE POLÍCIA* 54 (Revista dos Tribunais ed., 2d ed. 2004) ("an expressive act of police power") (translated by the author).

83. Maria Lúcia Luz Leiria, *Breves Considerações Sobre a Taxa de Controle e Fiscalização Ambiental – TCFA, Instituída Pela Lei n. 10.165/2000*, in *DIREITO TRIBUTÁRIO AMBIENTAL* 773, 777 (Heleno Torres ed., 2005) ("which police action to be exercised") (translated by the author).

84. ALBERTO XAVIER, *OS PRINCÍPIOS DA LEGALIDADE E DA TIPICIDADE DA TRIBUTAÇÃO* 59 (1978) (administrative legality and tax typification are not fulfilled by reference to an abstract model).

85. BERNARDO RIBEIRO DE MORAES, *DOCTRINA E PRÁTICA DAS TAXAS* 130 (Revista dos Tribunais ed., 1976).

rules (supplemental law)⁸⁶ providing for cooperation among the political entities and aiming at the attainment of balanced development and well-being nationwide.⁸⁷ Also, the Constitution requires that a supplemental law shall provide for the resolution of conflicts of taxing power among the federal union, the states, the federal district, and the municipalities and regulate the constitutional limits of the power to tax.⁸⁸

In this context, NEPA—received by the 1988 Constitution as supplemental law⁸⁹—established that the basic environmental police power is entrusted to states. And the Tax Code⁹⁰—also received by the Constitution as a supplemental law—requires that fee-taxed public services ought to be related to the respective incumbencies of the union, states, and municipalities, thus questioning the legitimacy of the IBAMA fee.

It seems that, due to procedural reasons in extraordinary appeals, the Supreme Court⁹¹ so far could not have examined issues such as the requirement of supplemental law, double taxation, and the strange set-off of local environmental fees against the federal IBAMA fee. A direct action of unconstitutionality filed by the National Confederation of Industry is yet to be tried.⁹²

The IBAMA fee risks bypassing the division of administrative competences provided for by NEPA (sole paragraph of article 23 of the Constitution). And public-service manipulation for the purpose of fee collection has been criticized by legal doctrine.⁹³ So, if according to NEPA the basic environmental police competences are entrusted to the states, the IBAMA fee may be rendered unlawful, for the respective public service is illegal in the first place and the corresponding fee may be contaminated by the illegitimacy of its taxable event.⁹⁴

Theoretically speaking, to validate the IBAMA fee, its drafters should have required the amendment of NEPA for changing the subsidiary nature of IBAMA's police power, and this ought to be made by supplemental law, not by an ordinary federal statute that is of an inferior hierarchy,⁹⁵ for potential conflicts of administrative and taxing competences are at stake.⁹⁶ Also, it must be noted that such supplemental law

86. C.F. at art. 69 (stating that supplemental laws must be approved by an absolute majority vote in both houses of Congress).

87. *Id.* at art. 23 sole paragraph.

88. *Id.* at art. 146 §§ I-II.

89. Leonardo Greco, *Competências Constitucionais em Matéria Ambiental*, 687 *REVISTA DOS TRIBUNAIS* 23-33, 27 (1993).

90. Also received by the Constitution as a supplemental law.

91. Leading case: RE-Recurso Extraordinário No. 416.601, Relator: Min. Carlos Velloso, 10.08.2005 (Braz.), available at www.stf.gov.br

92. S.T.F. ADI No. 2.422 (Braz.), available at www.stf.gov.br.

93. Geraldo Ataliba, *Taxa pelo Exercício do Poder de Polícia - Fato Gerador - Base de Cálculo*, 102 *REVISTA DE DIREITO ADMINISTRATIVO* 474, 489 (1970).

94. RUY BARBOSA NOGUEIRA, *CURSO DE DIREITO TRIBUTÁRIO* 164 (9th ed. 1989).

95. PAULO DE BARROS CARVALHO, *CURSO DE DIREITO TRIBUTÁRIO* 114-15 (Saraiva ed., 1985).

96. SACHA CALMON NAVARRO COELHO, *CURSO DE DIREITO TRIBUTÁRIO BRASILEIRO* 100 (7th ed. 2004).

itself would have to defer to municipal competence wherever the local interest is present.⁹⁷

The double taxation or fee overlap is connected to the administrative competence deviation and is finally uncovered by the unusual provision for an IBAMA fee set-off against state and municipal fees.⁹⁸

Unconstitutional duplication of local competences may not be justified by a federal need of cash. Nor can one reasonably understand the rationale behind the fee set-off device: each level of government has its own set of competences to which the respective services and fees must correspond. Should a local government exercise its police power and collect the relevant fee, then no federal service is to be rendered nor any federal fee due, there having no room for a strange discount, which in turn reveals an overestimation of the federal fee in the first place.

Also, the amount of the IBAMA fee does not pass the proportionality test. It is to be charged according to the revenues of the taxpayer, which has nothing to do with the cost of the environmental public service concerned, for it should be based on the amount of public work.⁹⁹

Sure fees may be secondarily calculated according to taxpayers' subjective circumstances, but in any event, this calculation must be accomplished with reference to the basic criterion above, that is to say, in proportion to, and limited to, the influence of taxpayers' private activities on the amount of public services, and specifically in terms of environmental taxation, the degree of internalization of environmental costs by the taxpayer, which represents a change in the respective behavior, so as to allow for less administrative controls.¹⁰⁰ The doctrine of tolerance fees (*Duldungsgebühr*) as applied to surveillance fees should come into play, thus enhancing the search for the real reasonable equivalence required in terms of accuracy of the taxable basis of environmental fees.

Even though Brazilian tax principles would not hamper a different approach, domestic doctrine and jurisprudence have been formalistic and conservative when it comes to cost-benefit testing (such as that reported by Herrera Molina as required by Spain's general law on fees and public prices).¹⁰¹ In fact, reasonableness is a tool for judicial control of proportionality, and it ought to be routine in courts, especially in relation to causal tributes, such as fees for public services. Otherwise, fiscal citizenship cannot be exercised without being subjected to arrogant, absolute presumptions, bordering on fiscal authoritarianism, which are inconsistent with the principles of transparency, morality, and efficiency in modern states governed by the rule of law.¹⁰²

And in this case, the gross revenues of the taxpayers¹⁰³ do not seem to

97. NEPA at arts. 5, 6, 14; see EDIS MILARÉ, *supra* note 75, at 263.

98. Lei No. 10.165 at art. 17-P, -Q.

99. Ataliba, *supra* note 93, at 488; MORAES, *supra* note 85, at 188.

100. See Molina & Vasco, *supra* note 47, at 93, 103.

101. MOLINA & TABOADA, *supra* note 25, at 105.

102. See C.F. at art. 37.

103. Lei No. 10.165 at art. 17-D § 1.

fit as an indication of polluting potentiality of the taxpayers' entrepreneurial activities.

Besides, when the law applies the additional and coordinated criteria of polluting potentiality and degree of natural-resource use of activities subject to environmental control, the respective list absolutely presumes degrees of potential pollution and degrees of use, not providing for migration from a high, medium, or low level to another, according to the foregoing perspectives, in as much as not paying attention to entrepreneurial specificities and anti-polluting investments.

A better solution would have been to leave to environmental authorities to classify businesses according to legal standards leading to low, medium, or high risk indications on a case-by-case basis, as it is done in France¹⁰⁴ and also in Brazil (as in the case of mandatory public insurance against labor accidents, as accepted by the Supreme Court,¹⁰⁵ subject to judicial control, technical evidence, and court debate).

The law under analysis therefore should not pass the test of constitutionality as to the principles of equality, reasonableness, and proportionality under due process material standards.¹⁰⁶

Moreover, potential-pollution absolute presumptions¹⁰⁷ may not be reversed by material evidence as to new levels of polluting risks due to environmental investments, so as to enhance a change in the risk-classification list, thereby reducing the amount of the IBAMA fee due by individual taxpayers. The stratification of the list impedes judicial control over administrative decisions that ought to be taken in classifying businesses according to general statutory criteria, attracting criticism on grounds of a breach of the principle of separation of powers.¹⁰⁸

Besides, the foregoing statutory approach to environmental taxation generates a perverse effect detrimental to sustainable development efforts in accordance with the principle of preservation, for environmental taxation ought to stimulate environment-friendly investments, because no specific advantage or fiscal incentive is granted in consideration thereof.

A final concern involves the risk of bureaucratic inertia being fed by new fiscal vegetative revenue (similar to a passive cadastre fee) with no engagement as to environmental behavior change. Having thereby secured funding, environmental authorities might feel indirectly stimulated to take pro-active measures, not actually performing the taxable event of the fee in question (which is the effective exercise of police power).

104. PRIEUR, *supra* note 3, at 45.

105. RE-Recurso Extraordinário No. 343.446 (Braz.), available at www.stf.gov.br.

106. C.F. at arts. 5, 150.

107. See PÉREZ DE AYALA, JOSÉ LUIS & CONDE DE CEDILLO, LAS FICCIONES EN EL DERECHO TRIBUTARIO 113-14 (Derecho Financiero ed., 1970).

108. Rafael Bielsa supports judicial control on matters of abusive, unequal, and disproportional taxes, for taxation is not a political issue, nor a subject of political discretion. See 2 RAFAEL BIELSA, ESTUDIOS DE DERECHO PÚBLICO 41-42 (1951).

VIII. STATE AND MUNICIPAL ENVIRONMENTAL FEES

Following article 17-B's IBAMA fee pattern, several states and municipalities have enacted laws instituting quite similar environmental fees, the taxable event of which is either "the exercise of police power conferred upon environmental agencies for controlling and inspecting businesses classified as potentially polluting and users of natural resources"¹⁰⁹ or "the exercise of police power pursuant to environmental licensing."¹¹⁰

A different pattern, more consistent with the doctrine supported by the author, has been followed by Macaé City (State of Rio de Janeiro), home to Brazil's largest offshore oil fields and huge supporting industrial and service businesses.¹¹¹ According to Local Law number 28, of December 28, 2001, which instituted a fee for inspection of environmental licensing, the taxable event of this fee is "the regular and effective administrative-police inspection, exercised over productive, commercial and service activities, and over the use of environmental resources aiming at conditioning and restricting the use and fruition of said goods."¹¹² The fee is assessed by taking into consideration the nature of the activity concerned, the size of the respective premises, and the cost of the regular and effective deployment of administrative police.¹¹³

Minas Gerais state¹¹⁴ and Rio de Janeiro state¹¹⁵ have enacted laws instituting forestall fees, which have followed the pattern of article 17-A's IBAMA fee intended to finance certain environmental police topical interventions authorizing designated activities such as the extraction or development of natural resources. These statutes have the merits of properly naming the exactions thereby created, calling them fees rather than public prices, which is the misleading wording used by federal law.

IX. SNUC ENVIRONMENTAL COMPENSATION

Law number 9.985, of July 18, 2000 (SNUC), instituted a mandatory financial support in favor of implementation and maintenance of "full-protection environmental conservation units," which must be established by the government.¹¹⁶

According to article 36 of the law, the foregoing financial support is due upon licensing of businesses causing significant environmental impact

109. Lei No. 14.940, de 29 de dezembro de 2003, D.O.E., Minas Gerais de 30.12.2003 (Braz.) (translated by the author); Lei No. 14.384, de 31 de dezembro de 2002, D.O.E. Goiás de 31.12.2002 (Braz.) (translated by the author).

110. Lei No. 5.441, de 14 de dezembro de 2001, D.O.E. Vitória 29.12.2001 (Braz.) (translated by the author).

111. Katherine Baldwin, *World's Largest Rig Sinks: Massive Oil Spill Feared*, TRIBUNE, Mar. 21, 2001, <http://www.tribuneindia.com/2001/20010321/world.htm#6>.

112. Lei Complementar No. 28 art. 332, de 28 de dezembro de 2001 (translated by the author), available at <http://www.macaerj.gov.br/legislacao/>.

113. *Id.* at art. 335.

114. Lei No. 4.747, de 9 de maio de 1968, D.O.E. Minas Gerais de 10.5.1968 (Braz.).

115. Lei No. 3.187, 12 de fevereiro de 1999, D.O.E. Rio de Janeiro de 13.2.1999 (Braz.).

116. Lei No. 9.985, de 18 de julho de 2000, D.O. de 19.7.2000 (Braz.) (translated by the author) [hereinafter SNUC].

as deemed by the competent environmental authority; the respective section 1 provides that the amount of the financial support is to be established by the licensing agency and must not be inferior to 0.5 percent of the total cost of the project concerned.¹¹⁷

Decree number 4.340, of August 23, 2002, has clarified that the licensing agency ought to establish the degree of the environmental impact (following an environmental impact study) taking into consideration "negative and immitigable impacts" on environmental resources.¹¹⁸

Ongoing unlicensed projects were ordered to apply for the respective environmental licenses within twelve months as of the above decree enactment date, thereby being subject to the new financial support under the terms of a "rectifying or corrective operating license."¹¹⁹

The foregoing financial support has been referred to as SNUC compensation because it substitutes for the previous material duties of implementing an ecological station¹²⁰ or conservation reserve¹²¹ to be fulfilled by entrepreneurs in instances where big businesses destroy forests or other ecosystems. Said duties (to be valued in proportion to the environmental damages caused) had been tentatively established by administrative normative acts and not by statute.¹²² Such material duties ought to be classified as tributes in kind or *in natura* equivalent to a *facere*, whereas as SNUC compensation would correspond to a *dare* (a tribute in specie) in lieu of the former.¹²³

SNUC compensation seems to be similar to the German compensatory taxes reported by Wilfred Kluth (statutes of Renania-North-Westfalia and of Baden Württemberg) whereby the agent causing environmental degradation in a given site ought to perform compensatory measures elsewhere, such as the planting of trees. Should this prove impossible or insufficient, then the polluter must pay the corresponding environmental

117. *Id.* at art. 36 § 1.

118. Decreto No. 4.340 art. 31, de 22 de agosto de 2002, D.O.U. de 23.8.2002 (Braz.) (translated by the author).

119. *Id.* at art. 34 (translated by the author).

120. Resolução CONAMA No. 10, DE 3 DE DEZEMBRO DE 1987, D.O.U. DE 18.3.1988 (Braz.). CONAMA is the National Council for the Environment, the federal normative authority for environmental matters.

121. Resolução CONAMA No. 2, DE 18 DE ABRIL DE 1996, D.O.U. DE 25.04.1996 (Braz.).

122. Those administrative acts, however, are allegedly based in article 4, section 1 of NEPA. NEPA at art. 4 § 1.

123. For taxes in kind, *see* THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TAXATION 587 (2d ed. 1886); ANTONIO BERLIRI & FERNANDO VICENTE ARCHE DOMINGO, 1 PRINCIPIOS DE DERECHO TRIBUTARIO 26-27 (Derecho Financiero ed., 1964); GIULIANI FONROUGE ET AL., DERECHO FINANCIERO 317-18 (7th ed.2001); ALBERTO XAVIER, MANUAL DE DIREITO FISCAL 38-39 (1974); PEDRO SOARES MARTINEZ, DIREITO FISCAL 45 (1998); BALEEIRO, *supra* note 54; GILBERTO DE ULHÔA CANTO, *Obrigações Tributárias, Seus Pressupostos e Elementos*, in CURSO DE DIREITO FINANCEIRO 104 (1958); ALFREDO AUGUSTO BECKER, *TEORIA GERAL DO DIREITO TRIBUTÁRIO* 562-80, 577 (2d. ed. 1972).

tax (compensatory tributes) in consideration for the above damages.¹²⁴ Such similarity reinforces the author's understanding that the Brazilian SNUC compensation ought to be treated as a true tribute.

A. TAXABLE EVENT

SNUC compensation falls within the statutory concept of a tribute as per the Brazilian National Tax Code.¹²⁵ "A tribute is any mandatory pecuniary payment, except penalties for illicit acts, to be made in money or that can be valued in monetary terms, instituted by law and levied through administrative ministerial acts."¹²⁶

In fact, the entrepreneur's duty to pay the financial support (pecuniary obligation) does not arise from the practice of any illicit act, his conduct falls within the environmental tolerance zone.¹²⁷ Pecuniary SNUC compensation substitutes for previous tributes in kind such as the establishment of environmental reserves following serious environmental degradation. And the situation that presently triggers taxation is neither the destruction of forests nor other ecosystems, but the development of projects that cause significant environmental impact.

B. THE CONCEPT OF SIGNIFICANT ENVIRONMENTAL IMPACT AND TAX LEGALITY

Brazilian environmental statutes do not provide for a definition of the concept of significant environmental impact. The Federal Constitution calls for mandatory environmental impact studies in cases of significant degradation of the environment.¹²⁸ The NEPA, however, does not determine the legal concept at stake;¹²⁹ nor does the SNUC¹³⁰ or its regulation¹³¹; neither does the Conselho Nacional do Meio Ambiente (CONAMA) resolution on environmental impact reports, which simply repeats NEPA's wording on environmental degradation and pollution.¹³² NEPA defines degradation of environmental quality as "the adverse alteration of the characteristics of the environment;" pollution is defined as "the degradation of environmental quality resulting from activities that

124. Wilfried Kluth, *Protección del Medio Ambiente Mediante Tributos Ecológicos en la República Federal Alemana*, in FISCALIDAD AMBIENTAL 194 (Ana Yábar Sterling ed., 1998).

125. The Tax Code is deemed by doctrine and case law as a supplemental law, approved by a 51 percent majority vote in both houses of Congress, which may not be contravened by ordinary statutes (*leis ordinárias*), such as the SNUC.

126. C.T.N. at art. 3 (translated by the author).

127. The SNUC does not quote article 225 section 3 as being thereby regulated; section 3 is the constitutional basis for environmental sanctions and damage collection.

128. C.F. at art. 225 ¶ 1 § IV.

129. NEPA at art. 10 § 4.

130. SNUC at art. 36.

131. Decreto No. 4.340 at art. 31.

132. Resolução CONAMA No. 1 art. 1, de 23 de janeiro de 1986, D.O.U. 17.2.1986 (Braz.).

damage the health."¹³³

Brazilian laws actually leave up to environmental authorities' discretion the concretization of the foregoing relevant and complex undetermined legal concepts, leaving little scope for judicial control of proportionality. Such way of describing or typifying the taxable event of SNUC compensation is subject to criticism on grounds of breach of tax legality. Former administrative CONAMA rules (though not statutes) objectively defined relevant environmental impact as the destruction (elimination) of forests and other ecosystems caused by engineering works, for the purposes of ordering the pollutant to establish an ecological station or an environmental reserve in consideration and in proportion thereof.¹³⁴ Now the SNUC leaves it open to environmental authorities to charge SNUC compensations in case of significant environmental impact, which is a rather volatile idea.

C. TAXABLE BASIS

Here again the law seems to be deficient. SNUC compensation is to be assessed not in proportion to the environmental damage generated by the entrepreneurial project, but in accordance with the degree of environmental impact deemed to be significant by environmental authorities.

The taxable basis of SNUC compensation is the total cost of the entrepreneurial project subject to a minimum tax rate of 0.5 percent.¹³⁵ Again, one finds here an inadequacy of the statutory language as to tax legality as interpreted by doctrine and by the Federal Supreme Court,¹³⁶ which requires that the basic tax guidelines are provided for by Congress even in the case of the use of undetermined legal concepts, which does not seem to be the case of SNUC compensation, the constitutionality and proportionality of which is virtually impossible under the circumstances. On the other hand, the law establishes the taxable basis as the total cost of the entrepreneurial project and not the economic dimension of the respective environmental impact, which would be a reasonable and controllable criterion.

Besides, the total cost of a project comprehends the value of accessory costs such as studies and interest, mitigation measures, etc., that ought to be deducted from that amount precisely either because they have nothing to do with the production of environmental impacts or because they are intended to fight pollution. So, there is a logical gap between a SNUC compensation taxable event (extraordinary environmental degradation) and the respective taxable basis as recommended by environmental taxa-

133. NEPA at art. 3 §§ II-III ("a) damage the health, safety and welfare of the population; b) create adverse conditions to social and economic activities; c) have an unfavorable effect on biota; d) affect the aesthetic or sanitary conditions of the environment; e) discharge materials or energy that do not conform to established environmental standards") (translated by the author).

134. Resolução CONAMA No. 10; Resolução CONAMA No. 2.

135. SNUC at art. 36 § 1.

136. See RE No. 343.446.

tion doctrine.¹³⁷

D. THE FEDERATIVE ISSUE

In Brazil, residual taxing powers pertain to the union.¹³⁸ Because there is no constitutional provision as to strict-sense environmental taxation, the establishment of a SNUC-like compensatory tax shall be deemed as attributed to the federal competence, to be exercised through the enactment of a supplemental law, as required by the Constitution, which is not the case of the SNUC. This circumstance attracts legal criticism on grounds of formal unconstitutionality of the law.

On the material side of the issue, such compensation being a federal tax, the SNUC could not have delegated authority for state and municipal environmental licensing agencies to levy the tax. Federative cooperation and solidarity have nothing to do with delegation of the power to tax, that ought to be granted by the Constitution directly to the competent political entity. Because most of environmental licensing in Brazil is conducted by states and the law also provides for state and city environmental conservation units, federal law could not have created a non-federal tax in favor of those local political entities. The union may not create local taxes, nor may federal tax revenue be attributed to local entities, except where provided to the contrary by the Constitution itself.¹³⁹

Finally, in order to ordain the exercise of potentially conflicting administrative (and connected taxing) competences, the Constitution requires the enactment of a supplemental law (not an ordinary law) that has not been produced so far. Thus, it seems that also from the federative viewpoint, SNUC compensatory tax does not pass the test of constitutionality.¹⁴⁰

137. Jean-Phillippe Barde, *Environmental Taxation: Experience in OECD Countries*, in ECOTAXATION 235 (Timothy O'Riordan ed., 1997); Amy J. Holzinger, *Eco-Taxes in the European Union: The Need for a Uniform Structure*, 21 WIS. INT'L L.J. 185, 198 (2003); Richard J. Pierce, Jr., *The Constitutionality of State Environmental Taxes*, 58 TUL. L. REV. 169 (1983); SUSANA BOKOBO MOICHE, *Gravámenes e Incentivos Fiscales Ambientales* 93, 95-96 (2000); MOLINA & TABOADA, *supra* note 25, at 166. Brazilian economic literature also proclaims that the amount of environmental losses are to be calculated by estimating costs connected to avoiding such losses. SEROA DA MOTTA & FRICKMAN YOUNG, *Sistemas Integrados – 3.3 Procedimentos de Valoração*, in CONTABILIDADE AMBIENTAL: TEORIA, METODOLOGIA E ESTUDOS DE CASOS NO BRASIL 35 (1995).

138. C.F. at art. 154 § I.

139. *Id.* at arts. 153 ¶ 4 § III, 157 § I.

140. The Federal Supreme Court is presently trying a direct unconstitutionality action challenging the SNUC compensatory tax; the Reporter Justice's opinion (made known on June 14, 2006) is in favor of the constitutionality of the tax, but the trial was suspended for better consideration of other justices. ADI No. 3.378, *available at* www.stf.gov.br

X. FINAL REMARKS

Environmental taxation is based on the polluter-pays principle, which is a fundamental principle of environmental law. Besides, taxing polluters would not violate a basic principle of tax law, which is the taxable ability principle.

Environmental imposts ought to be levied on wealth according to the taxpayers' economic strength, and polluters have a marginal gain when they pollute and do not internalize the costs of pollution, as if using the environment for profit were a cost-free business. In this sense, they may be a valuable instrument for purposes of environmental protection.

Regarding environmental fees, they are also based on the polluter-pays principle, so that polluters must fund environmental public services required by public interest in controlling polluting activities. Therefore, such fees ought to reflect a fair distribution of the public-service costs in connection to taxpayers' subjective circumstances interfering with those costs; such assessment should consider taxpayers' environmental investments that reduce or minimize the amount of administrative work of environmental authorities.

A. IBAMA'S ENVIRONMENTAL CONTROL FEE AS A PATTERN FOR TAXATION

Brazilian environmental fees take IBAMA's environmental control fee (IBAMA fee) as a pattern for such state and municipal taxation. Such fee seems inconsistent with some basic principles of taxation in general (the competent taxable event, tax equality, and tax legality) as well as with the polluter-pays principle that inspires environmental taxation.

The basic environmental control competence in Brazil is attributed to the states; but the law grants IBAMA, the federal Environmental Protection Agency, the power to levy a fee to be set off against local environmental fees, as if IBAMA fee would originally prevail over state and city environmental fees.

For argument's sake, the SNUC should at least be interpreted as allowing for exaction of IBAMA fee only in cases where IBAMA is to act under its lawful authority (i) to license and subsequently audit projects or businesses that cause a regional (inter-state) or national environmental impact, or (ii) to substitute for states and municipalities that have failed to fulfill their respective police-power environmental incumbencies.

The statutory design of the IBAMA fee is such that the taxpayer is not stimulated to invest in pollution control, for the fee basis does not allow for mobility among the respective, absolutely presumed, polluting-status brackets.¹⁴¹

The IBAMA fee has been challenged in courts and is yet to be fully tested (trial of direct unconstitutionality action being awaited) by the

141. The taxpayer is, however, subject to command-control measures.

Federal Supreme Court, which has upheld the fee in the strict procedural limits of extraordinary appeals. There is no doubt that environmental fees are a relevant tool for environmental policy and control and that the respective revenues are needed for funding of efficient environmental services. Expectations are that Brazilian environmental fees can be technically and fairly improved so as to properly finance public services with an eye at valuing entrepreneurial efforts towards curbing pollution. Environmental power to tax should lead to better taxation in such a way that a fair balance may be achieved among different federative financial needs; the exercise of the power to tax must not end up frustrating creative initiatives of entrepreneurial actors in response to their social and corporate responsibilities, that is, in favor of sustainable development through environment-friendly investments, which in turn would reduce the respective tax burden.

B. ENTREPRENEURIAL COMPENSATION

SNUC compensation is a compensatory tribute; its juristic nature is that of a strict sense environmental tax (impost), the first such tax ever instituted in Brazil, for it is levied in the presence of an extraordinary environmental damage (phrased by law as a significant environmental impact). Notwithstanding, the entrepreneur has the duty to reclaim the damaged environment as much as possible and to undertake all appropriate mitigation measures as foreseen in the required environmental impact study. The compensation should then be levied on the basis of the residual environmental loss or degradation. A correct legal approach of the law would be to assess the tax in proportion to the value of the damages cause by the entrepreneur-taxpayer, rather than to take into account the total cost of the project, in as much as investments in mitigation and in pollution control have not been provided for as reducing the taxable basis.

The SNUC does not seem to meet legality-principle requirements, for it fails to provide for tax-assessment objective criteria; not only is its definition of the taxable event (any significant environmental impact) unclear, but also it delegates to environmental licensing authorities the legislative duty to establish the amount and the limit of the tribute, for it simply refers to a minimum 0.5 percent of the total cost of the polluting project.

Because the taxable event of SNUC compensation is the actual verification of an environmental damage, the SNUC does not violate the general principle of non-retroactivity of statutes, such law being applicable as of its coming into force. There is no guarantee against retroactivity in environmental law.¹⁴² But the executive order that regulates the SNUC only indirectly provides for retroactivity in cases of non-licensed opera-

142. PRIEUR, *supra* note 3, at 129-30; ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 177 (2d ed. 1988)

tions that ought to be licensed.¹⁴³

Even though Congress has paid more attention to broad-meaning environmental tax proposals, the author believes that fair strict-sense environmental taxes ought to be established in Brazil so as to enhance sound public policies aimed at environmental protection. One reason for this optimistic expectation is found in the new wording of the Federal Constitution, which provides for environmental protection as a principle of Brazil's economic order, "including a differentiated treatment according to the environmental impact of products and services and the respective elaboration and rendering" processes.¹⁴⁴

143. SNUC at art. 34.

144. C.F. at art. 170 § IV (translated by the author).